IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Ali Saleh Kahlah Al-Marri, and Mark A. Berman as next friend **Petitioners** **v.** **Commander C.T. Hanft,** U.S.N. Commander, Consolidated Naval Brig, **Respondent**	**C/A No. 02:04-2257-26AJ** **Respondent's Answer to the Petition for Writ of Habeas Corpus**

Respondent Commander C.T. Hanft, Commanding Officer of the Consolidated Naval Brig in Charleston, South Carolina, by and through undersigned counsel, respectfully submits this Answer to the petition for writ of habeas corpus pursuant to 28 U.S.C. 2241.

STATEMENT

1. On September 11, 2001, the al Qaida terrorist network launched large-scale, coordinated attacks on the United States, killing approximately 3,000 persons. In response, the President, as Commander in Chief of the armed forces, took steps to protect the country from further threats. One week after the September 11 attacks, Congress enacted a resolution embodying its support of the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, * * * in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force (Authorization for Use of Force), Pub.

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L. No. 107-40, § 2(a), 115 Stat. 224. Congress specifically recognized the President's "authority under the Constitution * * * to deter and prevent acts of international terrorism against the United States," and Congress emphasized that the forces responsible for the September 11 attacks "continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States," "render[ing] it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad." Id., Preamble. The President soon made it express that the September 11 attacks "created a state of armed conflict" with al Qaeda. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (November 13 Military Order), 66 Fed. Reg. 57,833, § 1(a).

2. Petitioner is a Qatari and Saudi national who entered the United States on September 10, 2001, purportedly to pursue a graduate degree in computer science at Bradley University in Peoria, Illinois. United States v. Al-Marri, 230 F. Supp. 2d 535, 536 (S.D.N.Y. 2002). He had received an undergraduate degree from Bradley University ten years earlier, in 1991. Ibid.

On February 6, 2002, after having been detained in the Central District of Illinois and then transferred to the Southern District of New York as a material witness in the investigation of the September 11, 2001 attacks, petitioner was charged in a one-count indictment with possession of 15 or more unauthorized or counterfeit access devices with intent to defraud, in violation of 18 U.S.C. 1029(a)(3). See United States v. Al-Marri, 239 F. Supp. 2d 366, 367 (S.D.N.Y. 2002). On January 22, 2003, petitioner was charged in a second, six-count indictment with making false statements to the FBI, in violation of 18 U.S.C. 1001; making false statements in a bank application, in violation of 18 U.S.C. 1014; and using means of identification of another person for the purposes of influencing the action of a federally

insured financial institution, in violation of 18 U.S.C. 1028(a)(7). 274 F. Supp. 2d at 1004. On May 12, 2003, without objection from the government, the District Court for the Southern District of New York dismissed both indictments for lack of venue. Ibid.

On May 13, 2003, petitioner was presented in the Southern District of New York on a new criminal complaint that had been filed under seal in the Central District of Illinois on May 1, 2003. Al-Marri v. Bush, 274 F. Supp. 2d 1003, 1004 (C.D. Ill. 2003). On May 22, 2003, after being returned to the Central District of Illinois, petitioner was indicted by a grand jury in that district. Ibid. The new indictment alleged the same offenses alleged in the previous indictments in the Southern District of New York. Ibid.

3. On June 23, 2003, President Bush, invoking his constitutional authority as Commander in Chief as well as the authority granted to him by Congress through the Authorization for Use of Force, made a formal determination that petitioner "is, and at the time he entered the United States in September 2001 was, an enemy combatant." President's Order, ¶ 1 (attached hereto as Attachment A). That determination was the culmination of a thorough deliberative process in the Executive Branch involving several layers of review and evaluation by various agencies, including the Central Intelligence Agency (CIA), the Department of Defense (DoD), and the Department of Justice, see infra at 18-19. Through that careful evaluation process, the President specifically determined that petitioner "is closely associated with al Qaeda," id., ¶ 2, has "engaged in * * * hostile and war-like acts" against the United States, id., ¶ 3, "possesses intelligence" about al Qaeda that "would aid U.S. efforts to prevent attacks by al Qaeda on the United States," id., ¶ 4, and "represents a continuing, present, and grave danger to the national security" such that his detention is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States," id., ¶ 5. The President thus directed the Secretary of Defense to "receive [petitioner] from the Department

of Justice and detain him as an enemy combatant." Id. at 1.

Also on June 23, 2003, the district court dismissed the pending charges against petitioner with prejudice on motion of the government. 274 F. Supp. 2d at 1004-1005. Petitioner was moved to the Naval Consolidated Brig in Charleston, South Carolina. Ibid.

4. On July 8, 2003, petitioner's counsel filed on petitioner's behalf a petition for a writ of habeas corpus in the Central District of Illinois. 274 F. Supp. 2d at 1005. On July 16, 2003, the government filed a motion to dismiss that petition. On August 1, 2003, the district court granted the government's motion on the ground that the petition had been filed in an improper venue. The district court found that the habeas petition should have been filed in this District -- the district of al-Marri's present, physical confinement -- rather than in the Central District of Illinois. On August 25, 2003, the district court denied a motion for reconsideration filed by petitioner.

5. The court of appeals unanimously affirmed. Al-Marri v. Bush, 360 F.3d 707 (7th Cir. 2004). On April 9, 2004, petitioner petitioned the Supreme Court for a writ of certiorari; that petition remains pending before the Court.[1]

6. On July 8, 2004, petitioner filed a petition for a writ of habeas corpus in this Court. The petition raises five claims. First, petitioner asserts that he is a civilian, not an enemy combatant and, as such, "may not be detained by the military unless Congress has suspended the writ of habeas corpus." Pet. 10, ¶35 (citing Ex parte Milligan, 4 Wall. 2, 125 (1866)). Second, petitioner contends that he has a right to counsel in connection with the instant proceedings. Pet. 10-11, ¶¶37-41. Third, petitioner claims that his detention

[1] On April 26, 2004, the Court denied petitioner's motion to expedite consideration of his petition for a writ of certiorari. Al-Marri v. Rumsfeld, 124 S. Ct. 2090 (2004).

"is in violation of the Constitution and laws of the United States," id. at 11, ¶ 45, because "the military may not detain an individual seized within the United States without charge," id. at 11, ¶ 44. Fourth, petitioner complains that he "has not been afforded any process by which he might challenge his designation by the President as an enemy combatant * * * or his continued detention by the military on that basis." Id. at 12, ¶ 50. Finally, petitioner alleges that his "indefinite detention for the purpose of interrogation is unlawful" under the "Constitution and laws of the United States." Id. at 12, ¶¶ 54-55. Petitioner seeks declaratory and equitable relief, including an order "directing Respondent to charge Petitioner with a criminal offense or to release him." Id. at 13, ¶ 4.

ARGUMENT

Petitioner is properly detained as an enemy combatant. The President, after an elaborate and careful evaluation process involving multiple layers of review from various Executive Branch agencies, see infra 18-19, made an individualized determination that al-Marri is an enemy combatant who is "closely associated with al-Qaeda" and has "engaged in * * * hostile and war-like acts" against the United States on behalf of al-Qaeda.[2] See President's Order, ¶ 1. Contrary to petitioner's principal claim that the government has no authority to hold him without filing criminal charges, Pet. 11, ¶¶ 42-45, the Executive

[2] The Supreme Court has recently noted that "[t]he permissible bounds of the [enemy-combatant] category will be defined by the lower courts as subsequent cases are presented to them." Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2642 n.1 (2004) (plurality). For the purposes of this case, an enemy combatant can be considered a person who "has become a member or associated himself with hostile enemy forces" and has entered the Country bent on hostile acts. Detention of Enemy Combatants in the War of Terrorism, 150 Cong. Rec. S2701, S2704 (March 11, 2004) (remarks by Alberto R. Gonzales, Counsel to the President, to the American Bar Association, Standing Committee on Law and National Security); see also Ex parte Quirin 317 U.S. 1, 37-38 (1942) ("Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of * * * the law of war.").

Branch powers implicated by this case are not the President's law-enforcement powers, but his congressionally authorized and constitutionally-based war powers.

The authority to capture and hold enemy combatants for the duration of the conflict, without charges, for the purposes of incapacitation and protecting the nation's security is part and parcel of the war power.[3] That proposition was recognized by the Supreme Court in Ex Parte Quirin and was reaffirmed by the Supreme Court just this year in Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (plurality). Id. at 2639-2643 (plurality) (reaffirming Quirin); id. at 2682-2683 (Thomas, J., dissenting) (same).[4] That result is supported not only by ample military and judicial precedent, but by common sense as well. Allowing a belligerent closely associated with al Qaeda – an international terrorist organization with which this country is at war – to return to aiding terrorists could endanger the lives of citizens of the United States and our allies. The massive attacks against the United States on September 11, 2001, starkly demonstrate the grave threat posed by al Qaeda.

The President's authority to hold petitioner as an enemy combatant is particularly well established and the President's judgment is entitled to particular deference, because petitioner is an alien enemy combatant. Alien enemy combatants are afforded more limited process rights than citizens. See, e.g., Johnson v. Eisentrager, 339 U.S. 763, 769-776 (1950) (describing the reduced rights of resident and non-

[3] The proposition that enemy combatants may be held for the duration of armed hostilities is as old as recorded history. For example, the ancient Greek historian Thucydides notes that in 425 b.c. after the battle of Pylos during the Peloponnesian War, "the Athenians determined to keep [the captured Spartan combatants] in prison until the peace." Robert B. Strassler, The Landmark Thucydides: A Comprehensive Guide To The Peloponnesian War, 244, ch. 4.41 (Richard Crawley trans., 1998).

[4] Justice O'Connor's plurality opinion in Hamdi is controlling in that Justice Thomas differed with the plurality on grounds that were more deferential to the President than the plurality's. 124 S. Ct. at 2674-2685 (Thomas, J., dissenting).

resident aliens compared to citizens, especially during wartime).[5] And in this case, as the attached declaration of Jeffrey N. Rapp, Director, Joint Intelligence Task Force for Combating Terrorism (Sept. 9, 2004), demonstrates, petitioner's conclusory denials that he is an enemy combatant find no factual support.[6] Accordingly, the petition for a writ of habeas corpus should be denied.

I. Petitioner Is Lawfully Detained As An Enemy Combatant.

Petitioner asserts that his detention as an enemy combatant without criminal charges is unlawful, Pet. 9-11, ¶¶33-36, 42-45, but the legal principles on which his detention rests are well established. The military's authority to detain enemy combatants during hostilities is supported by the Constitution, Supreme Court and lower court precedent, the laws and customs of war, and, with respect to the current conflict, the express authorization of Congress. See U.S. Const. Art. II, § 2; Hamdi, 124 S. Ct. at 2639; Quirin, 317 U.S. at 30-31; Duncan v. Kahanamoku, 327 U.S. 304, 313-314 (1946); Hamdi v. Rumsfeld, 296 F.3d 278, 281-283 (4th Cir. 2002); Ex parte Toscano, 208 F. 938, 941 (S.D. Cal. 1913); L. Oppenheim, International Law 368-369 (H. Lauterpacht ed., 7th ed. 1952); Authorization for Use of Force, Pub. L. No. 107-40, 115 Stat. 224.

A. The Military's Detention of Enemy Combatants During Wartime Serves Critical National-Security Objectives.

The purpose of detaining enemy combatants during armed hostilities is to prevent them from

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[5] Although the Court in Rasul v. Bush, 124 S. Ct. 2686 (2004), found that the Court had undermined the basis for the Eisentrager Court's statutory holding in Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973), Eisentrager's discussion of the reduced rights of aliens remains good law.

[6] The unclassified declaration is attached hereto as Attachment B. Respondent is also submitting a classified declaration from Mr. Rapp under seal.

returning to armed conflict. See, e.g., Hamdi, 124 S. Ct. at 2640 ("The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.") (plurality); id. at 2678-2682 (Thomas, J., dissenting); Territo, 156 F.2d at 145 ("The object of capture is to prevent the captured individual from serving the enemy."); Moyer, 212 U.S. at 84-85 (Seizures of individuals "whom [the executive] considers to stand in the way of restoring peace" during an insurrection "are not necessarily for punishment, but are by way of precaution, to prevent the exercise of hostile power."). In keeping with this, it has long been recognized that detention of enemy combatants "is neither a punishment nor an act of vengeance," but rather "a simple war measure." W. Winthrop, Military Law and Precedents 788 (rev. 2d ed. 1920) (cited with approval in Hamdi, 124 S. Ct. at 2640 (plurality)).

When an enemy combatant is lawfully detained by the military, detention may serve another objective, namely, allowing our armed forces to gather military intelligence. It is widely recognized that lawfully detained enemy combatants may be interrogated by the military to obtain vital information to further the war effort. See L. Oppenheim, International Law 368-369 (H. Lauterpachted., 7th ed. 1952); see also Hamdi, 296 F.3d at 282 (overturning district court order allowing counsel unmonitored access to citizen enemy combatant, noting that the district court failed to consider "what effect petitioner's unmonitored access to counsel might have upon the government's ongoing gathering of intelligence"); see generally W. Winthrop, supra, at 788.

B. The President's Actions are Authorized by the Constitution, Congress, and Supreme Court Precedent.

There are two principal sources of legal authority to detain enemy combatants during the present conflict: the President's inherent authority as Commander in Chief and Congress's Authorization for Use

of Military Force.

Most fundamentally, the President has inherent authority to detain enemy combatants during periods of armed hostilities pursuant to his Commander-in-Chief powers under Article II, § 2-3 of the Constitution. See, e.g., The Prize Cases, 67 U.S. 635, 688 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force."); Hamdi, 296 F.3d at 281 ("It is the President who wields 'delicate, plenary and exclusive power * * * as the sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress.'") (citation omitted); Durand v. Hollins, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (President has authority to respond with military force if U.S. citizens or property are threatened.). Indeed, Congress itself acknowledged in its Authorization for Use of Force that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Pub. L. 107-40, 115 Stat 224. And as the Supreme Court's controlling opinion in Hamdi v. Rumsfeld explains, the "capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incidents of war.'" 124 S. Ct. at 2640 (plurality) (quoting Quirin, 317 U.S. at 28).

This Court need not rely solely on the President's inherent constitutional powers, however, because the President's actions in this case are also expressly authorized by Congress.[7] In the Authorization for Use of Force, Congress recognizes the President's constitutional authority to "take action to deter and prevent acts of international terrorism," Preamble, 115 Stat. 224, and it broadly authorizes the President "to use

[7] The Hamdi Court likewise found no occasion to address the President's independent authority as Commander in Chief to detain enemy combatants. See 124 S. Ct. at 2639 (plurality).

all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 * * * in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons," § 2(a), 115 Stat. 224 (emphasis added). As the Hamdi Court explained in holding that the military possesses the authority to hold even a United States citizen until the termination of the current hostilities:

> The [Authorization for Use of Force] authorizes the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11, 2001, terrorist attacks. There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the [Authorization for Use of Force].

124 S. Ct. at 2640 (citation omitted); see also id. at 2679-2680 (agreeing with plurality that Authorization for Use of Force authorizes President "to detain those arrayed against our troops") (Thomas, J., dissenting). In view of the Hamdi Court's reasoning that the military may hold even a citizen who fought with supporters of al Qaeda, there is no question that the military has authority to detain an alien determined by the President to be "closely associated with al Qaeda" and to have "engaged in conduct that constituted hostile and war-like acts" on behalf of al-Qaeda itself against the United States. President's Order, ¶ 3.

Petitioner suggests that because he was initially detained within the United States, the military does not have authority to continue to detain him. Pet. 11, ¶ 44. That argument is meritless. The fact that petitioner was taken into custody in the United States in now way takes him outside the scope of Congress's authorization to use force. In the Authorization for Use of Force itself, moreover, Congress observed that al-Qaeda and its supporters "continue to pose an unusual and extraordinary threat to the

national security," and Congress specifically expressed that it was "necessary and appropriate that the United States exercise its rights * * * to protect United States citizens both at home and abroad." Preamble, 115 Stat. 224 (emphasis added). Nor, in light of the nature of the September 11 attacks, can it be seriously argued that Congress in authorizing the use of force was less concerned about protecting the United States from attack than about rooting out terrorism abroad. The September 11 hijackers themselves were alien enemy combatants secreted within the United States when they murdered over 3,000 people. Thus, there can be no serious claim that Congress intended the Authorization for Use of Force, which was enacted as a direct response to the September 11 attacks, to authorize the detention of citizen enemy combatants captured abroad but not individuals identically situated to the perpetrators of the September 11 attacks -- i.e., alien enemy combatants found in the United States. See Reves v. Ernst & Young, 494 U.S. 56, 63 (1990) (a statute "must be understood against the backdrop of what Congress was attempting to accomplish in enacting" it).

Further, as the Supreme Court unanimously explained in Ex parte Quirin, 317 U.S. 1 (1942) -- a case in which citizen and non-citizen "enemy belligerents," id. at 38, were "taken into custody in New York or Chicago," id. at 21 -- the "universal agreement and practice" among nations is that enemy combatants such as petitioner are "subject to capture and detention [during wartime]," regardless of the location of their capture.[8] Id. at 30-31 (emphasis added). The Quirin Court rejected any suggestion that the saboteurs were "any less belligerents if, as they argue, they have not actually committed or attempted to commit any

[8] In Quirin, members of the German Marine Infantry landed by submarine during World War II on the coast of New York and Florida carrying explosives to engage in acts of sabotage. 371 U.S. at 21. The FBI ultimately located and detained the saboteurs in New York and Illinois. Ibid.

act of depredation or entered the theatre or zone of active military operations." Id. at 38. Indeed, the Quirin Court cited the saboteurs' attempt to pass themselves off as civilians to conduct attacks in the United States as a reason to accord them "the status of unlawful combatants." Id. at 35. Petitioner is thus likewise "subject to capture and detention" during wartime, id. at 31, and Congress was acting against Quirin's backdrop when it enacted the Authorization for Use of Force. See Bowen v. Massachusetts, 487 U.S. 879, 896 (1988) (noting the "well-settled presumption that Congress understands the state of existing law when it legislates"). Congress gave no indication that it intended to depart from that settled understanding, and the nature of the September 11 attacks as well as the terms of the Authorization for Use of Force foreclose any such interpretation.[9]

Petitioner mistakenly relies upon Ex parte Milligan, 4 Wall. 2, 125 (1866), to support the claim that "[a] civilian seized in the United States may not be detained by the military unless Congress has suspended the writ of habeas corpus." Pet. 10, ¶ 35. In Hamdi, the Court rejected a virtually identical claim, explaining that Ex parte Quirin, which the Court emphasized "both postdates and clarifies Milligan," effectively limited Milligan's holding to its facts. 124 S. Ct. at 2643 (plurality); see Quirin, 317 U.S. at 45 ("We construe the Court's statement [in Milligan] as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it."); cf. 124 S. Ct. at 2682 (distinguishing Milligan as involving, inter alia, criminal punishment) (Thomas, J., dissenting). Thus, the Court explained, Quirin,

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[9] The debates in Congress reflect the understanding that the President may be required to take action against the enemy within the Nation's borders. See Cong. Rec. H5660 (Sept. 14, 2001) ("This will be a battle unlike any other, fought with new tools and methods; fought with intelligence and brute force, rooting out the enemies among us and those outside our borders.") (Rep. Menendez); H5669 ("We are facing a different kind of war requiring a different kind of response. We will need more vigilance at home and more cooperation abroad.") (Rep. Velasquez).

not Milligan, "provid[es] us with the most apposite precedent that we have on the question of whether citizens may be detained" as enemy combatants, 124 S. Ct. at 2643 (plurality), and Milligan "does not undermine our holding about the Government's authority to seize enemy combatants," id. at 2642.

The Milligan Court had concluded that a non-belligerent citizen who had no connection with enemy forces, had never left Union territory, and who was in an area where the courts were open and functioning could not be treated as a combatant subject to seizure by the military under the laws of war. See 71 U.S. at 121-122. Quirin establishes, and Hamdi expressly confirms, that Milligan does not apply to those who have belligerent status because they are "part of or associated with the armed forces of the enemy," Quirin, 317 U.S. at 45, even though the belligerents are captured in the United States (as was the case in Quirin). See Hamdi, 124 S. Ct. at 2642-2643 (plurality). As the President expressly determined, and the attached declaration makes abundantly clear, petitioner is "closely associated with al Qaeda," President's Order, ¶ 2. Milligan, accordingly, is inapt.

C. Deference To The President's Determination That Petitioner Is An Enemy Combatant Is Constitutionally Required

Judicial deference to Executive Branch military determinations during wartime is a hallmark of the separation-of-powers principle. As the Hamdi Court explained in discussing "the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States":

> the law of war and the realities of combat may render such [military] detentions both necessary and appropriate, and our due process analysis need not blink at those realities. Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them.

124 S. Ct. at 2647 (plurality) (citing Department of Navy v. Egan, 484 U.S. 518, 530 (1988), and Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952)); see also 124 S. Ct. at 2650 ("[W]e do not question that our due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action.") (plurality); Quirin, 317 U.S. at 25 (holding that detentions "ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger" should not "be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted."); Johnson v. Eisentrager, 339 U.S. 763, 789 (1950) ("Certainly it is not the function of the Judiciary to entertain private litigation – even by a citizen – which challenges the legality, the wisdom, or the propriety of the Commander in Chief in sending our armed forces abroad or to any particular region."); In re Yamashita, 327 U.S. 1, 8 (1946) ("If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts."); Ludecke v. Watkins, 335 U.S. 160, 172 (1948) ("Such great war powers may be abused, no doubt, but that is a bad reason for having judges supervise their exercise, whatever the legal formulas within which such supervision would nominally be confined.").[10]

In addition to the fact that the Constitution squarely entrusts the Commander-in-Chief authority to

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[10] Judicial deference to Executive Branch military judgments is at its height where, as here, the challenged Executive Branch action has been authorized by Congress. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.") (Jackson, J., concurring); see also Rostker v. Goldberg, 453 U.S. 57, 70 (1981).

the President,[11] separation-of-powers concerns are heightened by two mutually reenforcing prudential factors, namely, the unique dangers posed by undue judicial intervention into military operations, and the limited institutional capacity of the judiciary to evaluate military determinations. With regard to the former, the Supreme Court has explained as follows:

> The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

Eisentrager, 339 U.S. at 779.

With regard to the judiciary' institutional capacities, the Fourth Circuit, in an earlier decision in Hamdi unaffected by the Supreme Court's subsequent decision, explained that

> [t]he federal courts have many strengths, but the conduct of combat operations has been left to others. The executive is best prepared to exercise the military judgment attending the capture of alleged combatants. The political branches are best positioned to comprehend this global war in its full context and it is the President who has been charged to use force against those "nations, organizations, or persons he determines" were responsible for the September 11 terrorist attacks.

296 F.3d at 283 (citations omitted).

The Supreme Court, too, has long recognized that "the lack of competence on the part of the courts [with respect to military judgments] is marked." Rostker v. Goldberg, 453 U.S. 57, 65 (1981); see Gilligan v. Morgan, 413 U.S. 1, 10 (1973) ("[I]t is difficult to conceive of an area of governmental activity in which

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[11] See Hamdi v. Rumsfeld, 316 F.3d 450, 462-463 (4th Cir. 2003), rev'd on other grounds, 124 S. Ct. 2633 (2004) (plurality) (discussing allocation of war powers under text of the Constitution).

the courts have less competence [than judgments involving control of a military force]."); Ludecke, 335 U.S. at 170 (Determinations with respect to how to treat enemy aliens "when the guns are silent but the peace of Peace has not come * * * are matters of political judgment for which judges have neither technical competence nor official responsibility.").

In keeping with these separation-of-powers concerns, the Hamdi Court, in a case involving the detention of a presumed United States citizen, cautioned lower courts as follows:

> We anticipate that a District Court would proceed with the caution that we have indicated is necessary in this setting, engaging in a factfinding process that is both prudent and incremental. We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.

124 S. Ct. at 2652 (plurality).

The Supreme Court's cautionary admonitions are especially apt in a case such as this where the President has made a wartime determination that a non-citizen should be detained by the military as an enemy combatant. In fact, the President's authority as Commander in Chief to detain an enemy combatant is particularly clear, the detainee's entitlement to intrusive judicial review of the President's determination is more questionable, and the judiciary's need to defer to the President's authority is correspondingly great, where the detainee, as here, is an alien enemy. Indeed, deference is particularly appropriate to the President's handling of alien enemy combatants, because in dealing with alien enemies the President acts "not only as Commander-in-Chief but also the guiding organ in the conduct of our foreign affairs. He who was entrusted with such vast powers in relation to the outside world was also entrusted by Congress, almost throughout the whole life of the nation, with the disposition of alien enemies during a state of war."

Ludecke, 335 U.S. at 173. As the Supreme Court explained in Eisentrager, "Executive power over enemy aliens * * * has been deemed throughout our history, essential to war-time security." 339 U.S. at 774. Although the Alien Enemy Act, 50 U.S.C. 21, which was at issue in Ludecke and discussed in Eisentrager, does not have direct application to this case, the Eisentrager Court stressed that during war time aliens, whether or not resident in the United States, are "constitutionally" subject to different treatment than citizens. 339 U.S. at 775. The Eisentrager Court additionally noted that "[a]t common law alien enemies have no rights, no privileges, unless by the king's special favour, during the time of war." 339 U.S. at 774 n.6 (citation and internal quotation marks omitted); cf. Hamdi, 124 S. Ct. at 2663 ("[A] plurality of this Court, asserts that captured enemy combatants (other than those suspected of war crimes) have traditionally been detained until the cessation of hostilities and then released. That is probably an accurate description of wartime practice with respect to enemy aliens.") (Scalia, J., dissenting) (citation omitted). The extent to which alien enemy combatants have less legal protections than citizens enemy combatants is strongly illustrated by the fact that none of the concurring or dissenting opinions in Hamdi would preclude the detention of alien enemy combatants.[12]

Indeed, the President's war powers with respect to aliens necessarily implicate pressing national-security and foreign-policy concerns. And as the Court has observed,

> [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a

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[12] In this connection, petitioner repeatedly relies on the plurality's description of the procedural rights of citizen detainees in Hamdi to challenge his detention as an enemy combatant, see Pet. ¶¶ 38, 49, 54, but that reliance is misplaced. The Hamdi plurality takes pains to clarify that its holding concerns only citizen detainees. See, e.g., 124 S. Ct. at 2635, 2648, 2651; accord id. at 2672 ("Several limitations give my views in this matter a relatively narrow compass. They apply only to citizens, accused of being enemy combatants, who are detained within the territorial jurisdiction of a federal court.") (Scalia, J., dissenting).

> republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

Matthews v. Diaz, 426 U.S. 67, 81 n.17 (1976) (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588-589 (1952)).[13] It is no accident, then, that while previous military efforts to detain citizens as enemy combatants in the United States generated a handful of lawsuits challenging the practice, see, e.g., Quirin, supra; In re Territo, 156 F.2d 142 (9th Cir. 1946), the power to detain alien enemies as enemy combatants for the duration of hostilities was so well established that the detentions of hundreds of thousands of aliens within the United States during World War II did not to our knowledge generate a single reported decision. Accordingly, where (as here) there is no dispute that the country is engaged in armed conflict and an alien is detained as an enemy combatant with respect to that conflict, the habeas court's factual review of the basis for the detention is at its most circumscribed.

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[13] The proposition that citizens and non-citizens may be extended different constitutional protections is well-established. For instance, in United States v. Verdugo-Urquidez, a nonresident alien whose Mexican residence was searched by federal agents, contended that the search violated his Fourth Amendment rights and the equal protection component of the Fifth Amendment by treating him differently from citizens with respect to the Fourth Amendment. 494 U.S. 259, 273 (1990). The Court flatly rejected his contention, explaining that "[n]ot only are history and case law against [Verdugo-Urquidez], but as pointed out in Johnson v. Eisentrager, 339 U.S. 763 * * * (1950), the result of accepting this claim would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries." Verdugo-Urquidez, 494 U.S. at 273. Cf. Mathews v. Diaz, 426 U.S. 67, 79-80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.").

The Court's recent decision in Rasul v. Bush, 124 S. Ct. 2686 (2004), does not affect Eisentrager's and Verdugo-Urquidez's holdings concerning aliens. Rasul decided only the question whether U.S. courts have statutory jurisdiction over petitions for writs of habeas corpus filed by aliens located outside U.S. territory. See 124 S. Ct. at 2695. The government is not contesting the Court's jurisdiction in this case.

D. The Evidence Underlying the President's Designation of Petitioner as an Enemy Combatant Amply Supports that Determination

The President correctly designated petitioner an enemy combatant. As the accompanying declaration demonstrates, that designation is fully supported by the evidence and is predicated on an elaborate and careful set of evaluation procedures that were applied to petitioner's case.

The Executive Branch evaluation process that petitioner underwent was essentially the same as that for United States citizens suspected of being enemy combatants. See generally 150 Cong. Rec. S2701, S2703-S2704 (daily ed. March 11, 2004) (reprinting Feb. 24, 2004, remarks of Alberto R. Gonzales, Counsel to the President, before the American Bar Association's Standing Committee on Law and National Security); Rapp Decl. ¶ 6. Under the process, following an initial assessment that a detainee is an enemy combatant, the Director of Central Intelligence forwards to DoD a recommendation concerning whether DoD should take the detainee into custody. The Director's recommendation includes a written assessment of the intelligence available concerning the detainee. The Secretary of Defense then produces a second written assessment based on the CIA's information and intelligence developed by DoD, and forwards that assessment (accompanied by the CIA and DoD reports) to the Attorney General. The Attorney General, in turn, provides DoD with a recommendation concerning whether the detainee should be taken into custody as an enemy combatant, as well as a legal opinion concerning the propriety of such an action. In addition to the CIA and DoD reports, the Attorney General's recommendation is informed by a memorandum from the Department of Justice's Criminal Division setting forth factual information concerning the detainee supplied by the FBI and a formal legal opinion from the Department's Office of Legal Counsel (OLC) analyzing whether petitioner is appropriately designated an enemy combatant. The Secretary

forwards to the President a package containing all of the forgoing material. Upon receipt of the Secretary's package by the White House, it is further reviewed by White House counsel, who provides the entire set of materials (including his own assessment) to the President.

Having reviewed the materials and information generated by this process, on June 23, 2003, the President determined that petitioner was an enemy combatant. Among the findings made by the President concerning petitioner are that petitioner is "closely associated with al Qaeda"; engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States; "possesses intelligence, including intelligence about personnel and activities of al Qaeda that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda * * * "; and "represents a continuing, present, and grave danger to the national security of the United States" whose "detention is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States." President's Order, ¶ 5.

The evidence underlying the President's findings is more than ample. The factual basis for petitioner's continued detention as an enemy combatant is elaborated in the attached declaration, which make clear that petitioner is "part of or associated with the armed forces of" al Qaeda. Quirin, 317 U.S. at 45.

The declaration shows, for example, that petitioner met with al-Qaeda members, including Osama Bin Laden, and offered to be a martyr in al-Qaeda's war against the United States and its allies; that he received training in al-Qaeda terrorist camps, including poisons training; that he was tasked by al-Qaeda with entering the United States prior to the September 11 attacks to serve as a sleeper agent to facilitate terrorist operations and future attacks against the United States that would follow on the September 11

attacks; and that he accepted those tasks and took numerous actions, including obtaining false identities and credit card information to assist other al-Qaeda sleeper agents within the United States and researching poisonous chemicals and information about the location and capacity of water reservoirs within the United States. As the declaration demonstrates, moreover, this information about petitioner and his relationship with and activities on behalf of al-Qaeda has been obtained from and corroborated by multiple intelligence sources.

In sum, as the declaration makes clear, petitioner's conduct, and the President's findings based on that conduct, establish that petitioner is an enemy combatant subject to detention by the military to ensure that petitioner does not continue engaging in hostile and war-like acts against the United States and its allies while hostilities against al-Qaeda remain ongoing. For the reasons set forth herein, that detention is consistent with the Constitution, Congress's Authorization for Use of Force, the laws of war, and the Supreme Court's decisions in Hamdi and Quirin.

II. Petitioner's Remaining Claims Do Not Merit Relief.

In addition to challenging the legality of his detention, see Pet. 9-10, ¶¶ 33-36; id. at 11, ¶¶ 42-45, petitioner also challenges certain conditions of his confinement. Regarding his second claim for relief, Pet. 10-11, ¶¶ 37-41, petitioner prays for an order "allow[ing] Petitioner to meet and confer freely with counsel * * *," id. at 13, ¶2. Petitioner's fourth claim for relief states that he "has the right to receive 'notice of the factual basis of for his classification, and a fair opportunity to rebut the Government's assertions before a neutral decisionmaker.'" Id. at 12, ¶ 49 (quoting Hamdi, 124 S. Ct. at 2648). Petitioner thus prays for an order "directing Respondent to: i) release Petition from custody; or ii) schedule [an evidentiary] hearing." Pet. 13, ¶ 5. Finally, with regard to his fifth claim for relief, petitioner prays for an order "directing

Respondent to cease all interrogation of Petitioner while this litigation is pending." Id. at 13, ¶3; see id. at 12, ¶¶ 52-55.

These claims do not warrant relief. First, petitioner's access-to-counsel claims are moot in view of the fact that the military has in fact granted him access to counsel. This Court found as much in its August 4, 2004 Oral Order concerning petitioner's July 19, 2004 motion for immediate access to counsel. While there remains the potential for disputes about the conditions of access to counsel, any possible further issues concerning counsel access, such as government monitoring of counsel-client interactions, are not ripe for review at this time. Should those issues materialize in a concrete factual context permitting the Court's informed consideration, the parties can fully brief them in response to any renewed motion by petitioner for unrestricted access by counsel. Cf. Hamdi, 124 S. Ct. at 2652 (noting that Hamdi "is now being granted unmonitored meetings" with counsel and "[n]o further consideration of this issue is necessary at this stage of the case") (plurality).[14]

Second, petitioner's claim to a "right to receive 'notice of the factual basis of his classification, and a fair opportunity to rebut the Government's assertions before a neutral decisionmaker,'" Pet. at 12, ¶49 (quoting Hamdi, 124 S. Ct. at 2648), provides no basis for the relief he seeks. As the Supreme Court made clear in Hamdi, even assuming arguendo that petitioner, an alien, enjoys the same due process rights as a United States citizen detained as an enemy combatant, the demands of due process would be fully satisfied either by an "an appropriately authorized and properly constituted military tribunal," 124 S. Ct.

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[14] Because petitioner is an alien properly held as an enemy combatant during wartime, and is not charged with any criminal offense, he has no right to counsel -- much less unconditional access to counsel -- under the Constitution, the Geneva Convention, or any other authority. In any event, the level of counsel access afforded by the government in this case would more than satisfy any right to counsel petitioner may claim.

at 2651, or by this Court's proper exercise of its habeas jurisdiction to review petitioner's claims, with appropriate regard for the "uncommon potential to burden the Executive at a time of ongoing military conflict" posed by such a habeas proceeding, id. at 2649. Petitioner has not been the subject of a military tribunal, but instead his enemy combatant status was determined by the President through a thorough and multi-layered review process. The President's determination, and this Court's appropriate exercise of habeas jurisdiction to review of that determination, provides petitioner with all the process he is due.[15]

Finally, petitioner's prayer for an order "directing Respondent to cease all interrogation of Petitioner while this litigation is pending," id. at 13, ¶ 3, is not ripe as the military is not currently interrogating him. More importantly, as explained above, interrogation of detained enemy combatants is recognized as permissible under the laws of war. See supra at 8. Accordingly, petitioner's efforts to enjoin interrogations is tied up with his broader challenge to the military's authority to detain him as an enemy combatant. If this Court finds that petitioner is properly detained as an enemy combatant, then there could be no basis for interfering with one of the underlying purposes for the military's detention of enemy combatants. While the Court in Hamdi found that "indefinite detention for the purpose of interrogation is not authorized" for a United States citizen, 124 S. Ct. at 2641 (plurality), petitioner, an alien, is not being held solely to interrogate him, but to prevent him from rejoining al Qaeda and engaging in terrorism.

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[15] Petitioner seeks an evidentiary hearing concerning his claims, but such a hearing is unwarranted at this stage in view of petitioner's vague and conclusory factual assertions. See David v. United States, 134 F.3d 470, 478 (1st Cir. 1998) (recognizing that 2255 petition may be dismissed without hearing where supporting "allegations are 'vague, conclusory, or palpably incredible,'" "even 'if the record does not conclusively and expressly belie [the] claim'") (citing Machibroda v. United States, 368 U.S. 487, 495 (1962)). In any event, there is no need to resolve whether an evidentiary hearing may be necessary until petitioner has reviewed and challenged the government's factual submissions. See Hamdi, 124 S. Ct. at 2652 ("We anticipate that a District Court would proceed with the caution that we have indicated is necessary in this setting, engaging in a factfinding process that is both prudent and incremental.") (plurality).

Nothing in Hamdi suggests that a validly detained enemy alien during wartime cannot be questioned, and petitioner cites no authority whatever suggesting that it is unlawful to interrogate such persons to obtain vital military intelligence.[16]

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[16] Petitioner characterizes his detention as "indefinite." Pet. 12, ¶¶ 54-55. But the detention of enemy combatants during World War II was just as "indefinite" while that war was being waged. Given the unconventional nature of the current conflict, it is unlikely to end with a formal cease-fire agreement, but that does not mean that petitioner will not be released. The military has no intention of holding captured enemy combatants any longer than is necessary in the interests of national security, and it has already released scores of enemy combatants. In any event, the plurality in Hamdi found just a few months ago that the issue of the indefiniteness of the detention is premature while combat operations are ongoing. 124 S. Ct. at 2641-2642; see ibid. (upholding military detention of enemy combatants without charges "for the duration of the relevant conflict"). Petitioner does not and cannot dispute that the United States is currently engaged in active military operations against al Qaeda. See, e.g., http://www.cnn.com/2004/WORLD/asiapcf/03/19/pakistan.alqaeda/ ("Battle Rages With Al Qaeda Fighters") (May 6, 2004) (reporting that U.S. assisting Pakistan in meeting armed resistence of al Qaeda fighters along Afghan border).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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District of South Carolina

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CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party of counsel of record by

☐ Hand Delivery
☐ Mailing

in the manner prescribed by the applicable Rules of Criminal Procedure.

This the 9th day of Sept. 20 04

ATTACHMENT A

THE WHITE HOUSE

WASHINGTON

TO THE SECRETARY OF DEFENSE AND THE ATTORNEY GENERAL:

Based on the information available to me from all sources,

REDACTED

In accordance with the Constitution and consistent with the laws of the United States, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40);

I, GEORGE W. BUSH, as President of the United States and Commander in Chief of the U.S. armed forces, hereby DETERMINE for the United States of America that:

(1) Ali Saleh Kahlah al-Marri, who is under the control of the Department of Justice, is, and at the time he entered the United States in September 2001 was, an enemy combatant;
(2) Mr. al-Marri is closely associated with al Qaeda, an international terrorist organization with which the United States is at war;
(3) Mr. al-Marri engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States;
(4) Mr. al-Marri possesses intelligence, including intelligence about personnel and activities of al Qaeda that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on the United States or its armed forces, other governmental personnel, or citizens;
(5) Mr. al-Marri represents a continuing, present, and grave danger to the national security of the United States, and detention of Mr. al-Marri is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens;
(6) it is in the interest of the United States that the Secretary of Defense detain Mr. al-Marri as an enemy combatant; and
(7) it is, REDACTED consistent with U.S. law and the laws of war for the Secretary of Defense to detain Mr. al-Marri as an enemy combatant.

Accordingly, the Attorney General is directed to surrender Mr. al-Marri to the Secretary of Defense, and the Secretary of Defense is directed to receive Mr. al-Marri from the Department of Justice and to detain him as an enemy combatant.

DATE: 6/23/03

White House Office-controlled Document

ATTACHMENT B

Unclassified Declaration of Mr. Jeffrey N. Rapp
Director, Joint Intelligence Task Force for Combating Terrorism

Pursuant to 28 U.S.C. § 1746, I, Jeffrey N. Rapp, hereby declare that, to the best of my knowledge, information and belief, and under the penalty of perjury, the following is true and correct:

Preamble

1. I submit this Declaration for the Court's consideration in the matter of Al-Marri v. Hanft, Case Number 2:04-2257-26AJ, pending in the United States District Court for the District of South Carolina.

2. Based on the information that I have acquired in the course of my official duties, I am familiar with all the matters discussed in this Declaration. I am also familiar with the interviews of Ali Saleh Mohamed Kahlah Al-Marri (Al-Marri) conducted by agents of the Federal Bureau of Investigation and by personnel of the Department of Defense (DoD) once DoD took custody of Al-Marri on 23 June 2003 after he was declared an enemy combatant by the President of the United States.

Professional Experience as an Intelligence Officer

3. I am a career Defense Intelligence Agency Defense Intelligence Senior Executive Service member appointed by the Director of the Defense Intelligence Agency. I report to the Director of the Defense Intelligence Agency. My current assignment is as the Director of the Joint Intelligence Task Force for Combating Terrorism (JITF-CT). JITF-CT directs collection, exploitation, analysis, fusion, and dissemination of the all-source foreign terrorism intelligence effort within DoD. In addition to my current assignment, I

have previously served as the first Director of the National Media Exploitation Center and as the civilian Deputy Director for the Iraq Survey Group in Qatar.

4. My active duty military intelligence career in the United States Army included service as the senior intelligence officer for the 1st Infantry Division, when deployed to Bosnia-Herzegovina; Commander of the 101st Military Intelligence Battalion, 1st Infantry Division, Fort Riley Kansas; Commander of the forward-deployed 205th Military Intelligence Brigade in Europe; and Deputy Director for the Battle Command Battle Lab, U.S. Army Intelligence Center at Fort Huachuca, Arizona. I also directed a South Asia regional analytic division in the Defense Intelligence Agency Directorate for Analysis and Production that was awarded the National Intelligence Meritorious Unit Citation for its accomplishments.

5. My military decorations include the Legion of Merit, Defense Superior Service Medal, Defense Meritorious Service Medal, and Army Meritorious Service Medal. I am a graduate of the U.S. Army War College. I hold a Masters degree in strategic intelligence from the Joint Military Intelligence College.

Declaration of Al-Marri as an Enemy Combatant

6. On June 23, 2003, President George W. Bush determined that Al-Marri is an enemy combatant. The President's determination was based on information derived from several Executive Branch agencies in a multi-layered Executive Branch evaluation. The evaluation process applied to Al-Marri is essentially the same as that for United States citizens suspected of being enemy combatants. See generally 150 Cong. Rec. S2701, S2703-S2704 (daily ed. March 11, 2004) (reprinting Feb. 24, 2004, remarks of Alberto R. Gonzales, Counsel to the President, before the American Bar Association's Standing

Committee on Law and National Security). As a general matter, the process involves assessments by the following agencies: Central Intelligence Agency, Department of Defense, Department of Justice, and the White House. First, following an initial assessment that a detainee might be an enemy combatant, the Director of Central Intelligence makes a written recommendation to DoD concerning whether DoD should take the detainee into custody. The Secretary of Defense then makes a second written assessment based on the CIA's report and intelligence developed by DoD, and provides that assessment (accompanied by the CIA and DoD reports) to the Attorney General. The Attorney General, in turn, provides DoD with a recommendation concerning whether the detainee should be taken into custody as an enemy combatant, as well as an opinion concerning the lawfulness of such an action. The Attorney General's recommendation is informed by the CIA and DoD reports as well as a memorandum from the Department of Justice's Criminal Division setting forth factual information concerning the detainee supplied by the FBI, and a formal legal opinion from the Department's Office of Legal Counsel (OLC) analyzing whether petitioner is appropriately designated an enemy combatant. The Attorney General's recommendation package to the Secretary includes the Criminal Division's fact memorandum and OLC's legal opinion. The Secretary forwards to the President a package containing all of the foregoing material. White House counsel reviews the package, makes his own assessment, and provides the materials (including his own assessment) to the President. The President then determines on the basis of the foregoing whether the detainee is an enemy combatant.

Overview

7. Al-Marri, also known as Abdulkareem A. Almuslam, is currently being detained in the Naval Consolidated Brig in Charleston, South Carolina. The President of the United States has determined that he is an enemy combatant that is closely associated with al Qaeda, an international terrorist organization with which the United States is at war, and that he has engaged in hostile and war-like acts against the United States. Multiple intelligence sources confirm that Al-Marri is an al Qaeda "sleeper" agent sent to the United States for the purpose of engaging in and facilitating terrorist activities subsequent to September 11, 2001, and exploring ways to hack into the computer systems of U.S. banks and otherwise disrupt the U.S. financial system. Prior to arriving in the United States on September 10, 2001, Al-Marri was trained at an al Qaeda terror camp. He met personally with Usama Bin Laden (Bin Laden) and other known al Qaeda members and volunteered for a martyr mission or to do anything else that al Qaeda requested. Al-Marri was assisted in his al Qaeda assignment to the United States by known al Qaeda members and traveled to the United States with money provided for him by al Qaeda. Al-Marri currently possesses information of high intelligence value, including information about personnel and activities of Al Qaeda.

Al-Marri's Background and Training

8. Al-Marri is a dual national of Saudi Arabia and Qatar. Al-Marri attended college in the United States; in 1991, he obtained a bachelor's degree in business administration from Bradley University in Peoria, Illinois.

9. Multiple sources have confirmed that Al-Marri attended an al Qaeda terror training camp.

10. Al-Marri entered the United States with his family on September 10, 2001, purportedly to pursue a graduate degree in computer science at Bradley University. School officials at Bradley reported that Al-Marri contacted them in July 2001 about beginning his studies during the Fall 2001 semester. By mid-December 2001 he had rarely attended classes and was in failing status.

Al-Marri's al Qaeda Activities

Analysis of Laptop Computer

11. The FBI interviewed Al-Marri on October 2, 2001, and again on December 11, 2001. Subsequent to the second of these interviews, the FBI conducted a forensic examination of Al-Marri's laptop computer. The results of that examination are discussed by category below.

Chemical Research

12. Al-Marri was trained by al Qaeda in the use of poisons. In the hard drive of Al-Marri's laptop, FBI agents discovered a folder entitled "chem," which contained bookmarked Internet sites of industrial chemical distributors. Analysis revealed that Al-Marri had visited a number of sites related to the manufacture, use and procurement of hydrogen cyanide.

Communication Tactics

13. On September 22, 2001, five email accounts, which Al-Marri later stated belonged to him, were created from the same computer during one log-on session. The computer on which these email accounts were created was part of the network operated by Western Illinois University in Macomb, Illinois.

14. Among the messages located in three of these email accounts were identical draft messages written in English on September 22, 2001, which read as follows, with all errors as in the originals:

> "hi
>
> I hope every thing is ok with you and your family. I have started school ok. It is hard but I had to take 9 hours to meet the school standard. Me and my family are ok. I want to here from you soon can you contact me by email or on 701-879-6040.
> P.S.
> I have tried to contact you at your uncle ottowa but I could not get in."

15. In the United States, the area code 701 is assigned to North Dakota. However, subscriber checks for telephone number 701-879-6040 were negative. Upon further analysis, it was determined that telephone number 701-879-6040 is a coded message.

Additional Computer Files

16. Analysis of Al-Marri's laptop revealed computer files containing Arabic lectures by Bin Laden and his associates on the importance of jihad and martyrdom, and the merits of the Taliban regime in Afghanistan. These lectures instructed that Muslim scholars should organize opposition to Jewish and Christian control of Palestine, Lebanon, and Saudi Arabia; that ordinary Muslims should train in Bin Laden camps in Afghanistan by entering through Pakistan; and that clerics who claim that Islam is a religion of peace should be disregarded. There were also computer files containing lists of websites titled "Jihad arena," "Taliban," "Arab's new club - Jihad club," "Tunes by bullets," and "martyrs." Other computer folders contained additional favorite bookmarked websites, including sites related to weaponry and satellite equipment.

17. Photographs of the September 11, 2001 terrorist attacks on the World Trade Center were also discovered on the computer along with various photographs of Arab prisoners

of war held by authorities in Kabul, Afghanistan; an animated cartoon of an airplane flying at the World Trade Center; and a map of Afghanistan.

18. In addition, Al-Marri's laptop computer contained numerous computer programs typically utilized by computer hackers; "proxy" computer software which can be utilized to hide a user's origin or identity when connected to the internet; and bookmarked lists of favorite websites apparently devoted to computer hacking.

Telephone Communications

19. After the terrorist attacks of September 11, 2001, calling cards attributed to Al-Marri were utilized in attempts to contact the United Arab Emirates (UAE) telephone number of an al Qaeda financier, Mustafa Ahmed Al-Hawsawi (the "Al-Hawsawi number"). Analysis of Al-Marri's cellular telephone records indicated that Al-Marri utilized cell sites during some of the same times and in the same geographical areas, as the attempted calls to the Al-Hawsawi number.

20. On September 23, 2001, a telephone call was attempted from a pay telephone in a store in Peoria, Illinois to the Al-Hawsawi number. The calling card used for that call was used again four days later, on September 27, 2001, from a cellular telephone subscribed to by Al-Marri. Thereafter, on October 14, 2001 the same calling card was used again from a pay telephone in a gas station in Springfield, Illinois (approximately sixty-five miles from Peoria) to the Al-Hawsawi number. During the same time period and on the same day, Al-Marri's cellular telephone utilized cell sites in Springfield, and Lincoln (approximately 20 miles north of Springfield), Illinois.

21. Approximately three weeks later, on November 4, 2001, a different calling card was used from a pay telephone in Chicago, Illinois to attempt a call to the Al-Hawsawi

number. On the same day, Al-Marri's telephone records indicate that Al-Marri's cellular telephone utilized sites in Chicago to access its voicemail system and to call Al-Marri's home telephone number. The calling card used on November 4, 2001, was then used again three days later to place a call from Al-Marri's home telephone number.

Credit Card Theft

22. Upon the seizure of his laptop computer, Al-Marri provided the computer carrying case to the FBI. Inside the case, agents found a folded two-page handwritten document that listed approximately thirty-six credit card numbers, the names of the account holders, an indication as to whether each credit card number was Visa or Mastercard, and the expiration dates. The expiration dates on the list reflected past expiration dates for each of the cards. Al-Marri was not listed as the account holder for any of the approximately thirty-six cards. Approximately seventeen of the thirty-six credit card numbers were issued by domestic banks. Based on the records of the issuing domestic banks, the credit card numbers were either currently valid or were once valid and were issued to persons other than Al-Marri.

23. During the previously mentioned forensic examination of Al-Marri's laptop computer, computer files containing over 1,000 apparent credit card numbers were found stored in various computer files. The examination of Al-Marri's laptop computer also revealed computer folders called "hack," "id," "crack," "final," and "online store," among others. These computer folders contained a list of numerous favorite bookmarked internet websites relating to computer hacking; fake driver's licenses and other fake identification cards; buying and selling credit card numbers; and processing credit card transactions. When agents visited an internet website that was bookmarked in the "hack"

folder of Al-Marri's laptop computer, the internet website appeared to be an electronic bulletin board that allows internet users to post and advertise messages. Topics advertised on this website included: "sale CC," "I buy cc (with exp. data not less than 2003)"; "I will buy credit Card"; "I sell new creditcard (Visa, maser, expres. . .)"; "Credit card for sae. 0.3 $/1cc w/o CVV"; and "I sell #cc without cvv2." As a result of the information discovered within Al-Marri's laptop computer and carrying case, the material witness warrant was vacated and Al-Marri was immediately taken into custody pursuant to a charge of unauthorized possession of credit card numbers with intent to defraud, in violation of 18 USC §1029(a)(3). In February 2002, Al-Marri was indicted on this charge in the SDNY.

Analysis of Credit Card Numbers

24. Fraudulent purchases at "AAA Carpet" were identified on several of the credit card numbers that were in Al-Marri's possession. "AAA Carpet" has been determined to be a fraudulent business for which an individual named Abdulkareem A. Almuslam opened bank accounts in Macomb, Illinois, in July and August 2000. Signature cards and account applications from the three banks in Macomb, Illinois, at which Almuslam opened accounts have significant similarities to the signatures of Al-Marri on his passport and other documents. In addition, an eye doctor in the area identified Al-Marri in a photographic array as a patient the doctor treated under the name Almuslam. Latent print analysis of original documents from the banks and the eye doctor's office has resulted in three positive fingerprint identifications of Al-Marri. During this time period, Al-Marri, aka Almuslam, also opened an account to process credit card transactions for AAA

Carpet; records for this account indicate that twelve credit cards were processed for AAA Carpet during the time the account was active. All twelve transactions were later voided after the true cardholders notified their credit card providers of the fraudulent charges. Investigation to date has confirmed six of the twelve credit cards that received charges to AAA Carpet were found within Al-Marri's laptop computer. Al-Marri, aka Almuslam, also created an account on June 13, 2000 with PayPal.com, an internet service that allows the electronic transfer of funds to anyone who possesses an email account.

25. As a result of the above investigation, a second indictment was filed in SDNY on January 22, 2003 against Al-Marri alleging two counts of making false statements to federal agents for denying his calls to the UAE telephone number of Al-Hawsawi and for not advising of his travel to the United States in 2000, in violation of 18 USC §1001(a)(1) and (2); three counts of making false statements to a financial institution for opening bank accounts under a false name, in violation of 18 USC §1014; and one count of using a means of identification of another person for unauthorized use of a social security account number to open a bank account, in violation of 18 USC §1028(a)(7). The two indictments against Al-Marri were subsequently consolidated. In April 2003, Al-Marri withdrew his waiver of venue, which allowed him to be tried in the SDNY; he was then indicted on May 22, 2003 in the Central District of Illinois on the same seven charges.

Conclusion

26. In conclusion, investigation has determined that Al-Marri was an active al Qaeda operative at the time of his entry into the United States on September 10, 2001. Al-Marri was sent to the United States at the behest of al Qaeda. Upon his arrival in the United States, Al-Marri engaged in conduct in preparation for acts of international terrorism

intended to cause injury or adverse effects on the United States. Al-Marri's status has been subject to a rigorous review process and it has been determined that Al-Marri represents a continuing grave danger to the national security of the United States. Al-Marri must be detained to prevent him from aiding al Qaeda in its efforts to attack the United States, its armed forces, other governmental personnel, or citizens.

Jeffrey N. Rapp
Director, Joint Intelligence Task Force for Combating Terrorism

Executed on 9 September 2004 in Washington, D.C.